No. 17,004

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFONS SIMON KEIL,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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JURISDICTIONAL STATEMENT

Appellant filed a petition for naturalization under ne provisions of Section 315(a) of the Immigration nd Nationality Act (8 U.S.C.A. 1427(a)) in the n ed States District Court for the Northern Dis- ic of California, Southern Division, on March 18, 5 (T. 2-3). His petition for naturalization was ered by District Judge Albert C. Wollenberg on ach 30, 1950 (T. 7-12). Notice of appeal was filed it the Clerk of the District Court on May 23, 1960 T 13).

Jurisdiction of the District Court to entertain the etion for naturalization is conferred by Section 1(of the Immigration and Nationality Act of 1952

(8 U.S.C.A. 1421). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 1291, Title 28, U.S.C.A., as amended July 7, 1958.

The order of the District Court denying the petitioner's application for United States citizenship is a final decision within the meaning of 28 U.S.C.A. 1291. (*Tutun v. U.S.*, 270 U.S. 568, *U.S. v. Rodick*, 167 F. 469).

STATUTES INVOLVED

Section 1426. Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.

"(a) Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

"(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

STATEMENT OF THE CASE

Appellant was born in Germany on July 9, 1928. Appellant and his wife were lawfully admitted to the

ned States for permanent residence at the Port of
e York on August 4, 1953, at which time appellant
25 years of age.

ppellant was required to register for selective
ce and training under the provisions of the Uni-
al Military Training and Service Act of 1951 (50
C.A., Appendix 454) within six months following
s admission to the United States. In January, 1954,
itin the period prescribed by statute, appellant ap-
aed at the Draft Board for the purpose of comply-
gvith the provisions thereof; that on or about Feb-
ay 4, 1954 appellant was registered for selective
rice at Local Board No. 52, Oakland, California;
a shortly thereafter a selective service question-
ai was mailed to appellant by his Draft Board;
a after completing the same, with outside help, said
uestionnaire was returned to the Draft Board within
eperiod prescribed. On or about February 17, 1954,
e Draft Board mailed to appellant Form C-294
Request for exemption from military service). Said
on was signed by appellant and returned to the
rft Board on or about February 26, 1954. The rec-
rd shows that said form was received by the Draft
ord on March 1, 1954 and that on March 3, 1954
ppellant was classified IV-C, Treaty Alien, as a con-
equence of such request. The appellant contends that
e was absolutely ignorant of the contents of that
plication and had no knowledge that such a request
or exemption from military service in the Armed
rces of the United States had been filed until in-
rmed of that fact by the Immigration and Natural-

ization Service following the filing of his formal pti-
tion for naturalization. The District Court accepted
the recommendation of the Naturalization Examiner,
adopting his findings of fact and conclusions of law
that the appellant is ineligible for citizenship by vir-
tue of the provisions of Section 315 of the Immigra-
tion and Nationality Act (8 U.S.C.A. 1426) having
applied for and been relieved from military service
because of alienage. It is from that adverse decision
that the present appeal follows.

SPECIFICATION OF ERRORS

1. The District Court erred in finding that appel-
lant was an alien permanently ineligible to become a
citizen of the United States.

2. The District Court erred in denying appellant's
petition for naturalization as a citizen of the United
States.

ARGUMENT

Appellant, a native of Germany, filed his petition
for United States citizenship in the United States
District Court for the Northern District of California,
Southern Division, on March 18, 1959. The District
Court held that appellant was debarred from citizen-
ship because he had applied for and was relieved from
military service contrary to the provisions of Section
315 of the Immigration and Nationality Act of 195

Appellant has identified Selective Service Form C-
294, application by alien for exemption from military

rvce in the Armed Forces of the United States, td February 26, 1954 as bearing his signature. owever, appellant contends that he was unable to ac write or speak the English language, was not 'omed of the contents of such form, or the conse- ieces of signing and filing the same. To give cre- n: to appellant's inability to understand the nature dmport of the aforementioned document, attention ivited to testimony of his wife, of neighbors and of ladlady which is of record in the Court below.

I has been judicially held that even though such n pplication has been executed, an alien may be ex- isd from its effects, and relieved from the bar under rtin circumstances. Thus, in *McGrath v. Kristen-* n 340 U.S. 162, 172, Kristensen, a Danish citizen, ac application for relief from service as a neutral id under Section 3(a) of the Selective Training and erice Act of 1940 (predecessor statute to Section 15 of the Immigration and Nationality Act of 1952), ho he made the application he was not a resident of ne United States and was therefore not liable for n ed States military service under the statute. In *loer v. U. S.,* 341 U.S. 41, petitioner, a Swiss na- onl, applied for and received exemption from mili- ar service as a neutral alien under Section 3(a). In eahing its conclusion that Moser was not debarred ro citizenship by the application which he signed, he Supreme Court said:

"Petitioner did not knowingly and intentionally waive his right to citizenship. In fact, because of the misleading circumstances of this case, he

never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all of the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. Johnson v. U.S., 318 U.S. 189, 197 63 S. Ct. 549, 553, 87 L. Ed. 704. To hold otherwise would be to entrap petitioner."

(341 U.S., at page 47.)

Appellant and his wife were lawfully admitted to the United States for permanent residence on August 4, 1953, at which time appellant was about 25 years of age. Pursuant to statute, and within the period prescribed, he registered for selective service at Local Board No. 52, Alameda County, State of California, on February 4, 1954. The record shows that shortly after such registration a selective service questionnaire was mailed to appellant by his Draft Board and that the completed questionnaire was received by the Local Board on February 16, 1954. The Selective Service File (Exhibit No. 2) also shows that the Local Board mailed to appellant Form C-294 on February 17, 1954; that it was returned to the Board on March 1, 1954 and that, as a consequence of this application, appellant was classified IV-C, Treaty Alien, on March 3, 1954. The document (Form C-294) indicates that it was signed by appellant at Oakland, California on February 26, 1954.

It is clear from the record that neither appellant nor his wife could read, write or speak any English

hasoever at the time of their arrival and admission te United States on August 4, 1953. At the time of pellant's registration for selective service, he and s wife had resided in the United States for a period x months. Appellant and his wife, immediately po completion of five years of residence in the ned States, filed their respective applications to tion for naturalization.

Appellant and his wife have both testified that they adno recollection of ever having seen or executed the pplication for exemption from military service Form C-294) until June 30, 1959 at which time he asconfronted with that document. At that time, appellant was questioned by a Naturalization Examiner s to the execution of Selective Service Form C-294 Exhibit 3). In summary, the appellant stated that he idnot ever remember signing the application for exemption from military service; that he did not read English nor did he speak or understand it very well t ne time such form was executed on February 26, 95; that he was assisted in preparing his selective ervice questionnaire by a brother who completed all f ne answers on said questionnaire; that appellant emembers signing said questionnaire and admits that hesignature thereon is his own; that appellant has o recollection whatsoever of the application for exmption. However, he does identify the signature appearing thereon as his own. (Cf. Court's Opinion, -9)

Appellant's wife was likewise examined at the same earing. She stated that "she could not understand

the English language well at the time of the execution of the form for exemption; that she has no recollection or remembrance of reading or seeing anything like the form; that it contains words she did not know the meaning of; and she identified the written portion of the application for exemption form as being in her handwriting." (Court's Opinion, T-9.)

At the hearing before the lower Court, appellant's wife testified in behalf of her husband as follows.

T. 34-35:

"Q. Before you came to the United States, had you ever studied English at all?

A. No, I didn't have a chance, because no chance in our little town where you can take up English. You have to go to college to do that.

Q. Tell the Court what you did following your arrival in the United States in August, 1953.

A. I first came on the train, didn't have anything to eat for three days, because we couldn't order anything, just bought peanuts when we stopped over, and things like that. Then we went to the aunt's for five or six weeks, about 76 years old, something like that, and then we looked for an apartment. That is where we met Mrs. Wise, and we had been married for six months, and no way of getting out, and so then we moved to Mrs. Croft, where there was a cheaper apartment and was around March; then in August, I started working at Edy's.

* * *

Q. At the time that you moved—when did you move from the first apartment to the second apartment?

A. Well, it was the 19th of March we moved into the cheaper place.

Q. Now, when you were living in the first apartment, before moving to the second apartment, had you or your husband learned any English?

A. Very little. His brother was living with us, and we trusted him; but he didn't know more than we did."

135:

"Q. At the time you filled in that second form, which is a short form which the Government has shown you——

A. Yes.

136:

Q. Did you know that you were filling in a form asking for an exemption on behalf of your husband?

A. No, we didn't; we didn't know the form existed until last July at the hearing on Sansome.

Q. Is that the first time you knew that that form existed?

A. Yes, sir; that is.

Q. That's July, 1959?

A. It was June 30 when we had that appointment for the hearing, because when we were up for the test, the examiner said 'You refused to go the Army,' and we were sure there was a mistake, just a matter of checking up, because we didn't do so. Then last July we had a hearing and they showed us the paper there. We never have seen that paper before, at least didn't remember it existed.

* * *

Q. But at the time you did not know that at form was asking for an exemption from mili ry service?

A. No, we did not know that."

T. 39:

"Q. How about down here, Section 315?

A. I have no idea what that said.

Q. (Reading): 'Notwithstanding the pr vi sions of Section 405, any alien who applies or ho has applied for exemption or discharge fr training or service in the armed forces or in h er, national security corps of the United State or En the ground that he is an alien and is or was re lieved or discharged from such training or servic on such grounds shall be permanently ineligib to ish become a citizen.' You didn't read that?

A. No, sir. Do you think we would have go to school for six months and filed an applica ion and do everything if we had known that?"

T. 40:

"The Court. So now when you answer Mr Lyons and saying you could read some an couldn't read other portions, you are just as m ing that's right, isn't that it? You have no rec llection of what happened?

The Witness. No, we didn't know we filed any thing like that up until last July. We er shocked to see such a paper existing."

At the hearing before the lower Court, the wit nesses testified as follows:

Witness: *Melanie Weise* (T. 21):

"Q. Mrs. Weise, do you know the petitioner Alfons Keil?

A. Yes, I do.
Q. You know his wife?
A. Yes.
Q. Can you tell the Court approximately when ou first met the petitioner?
A. First time I met them, August, 1953, when ney look for an apartment. And then I didn't ee them for all the months until January—I nean New Year's Eve. We brought them over nat time and since then, we met all the time.
Q. Now, at the time you first met the petiioner, did he speak or understand a single word f English?
A. No, nothing.
Q. When do you feel that he first learned any nglish, whatsoever?
A. Well, it took him a long time, at least one nd a half, almost two years until he could get round a little bit."

T.22:

"Q. On that occasion, did he speak or undertand any English; that is, December 31, 1953?
A. He could speak no English at all."

Witness: *Eileen Croft* (T. 24):

"Q. Miss Croft, do you know the petitioner, Alfons Keil?
A. Yes, sir, I do.
Q. When did you first meet him?
A. About March, 1954.
Q. Where did you meet him at that time?
A. They rented an apartment from us.
Q. Do you remember the occasion?
A. Yes, sir; I do.

Q. At that time, could the petitioner speak or understand any English?

A. No, sir; he could not.

Q. How long did he live in that apartment that they rented from you?

A. Oh, I'd say about three or four years.

T. 25:

"Q. Now, of your own knowledge, he could not understand or speak any English at the time he rented your apartment in about March, 1954?

A. That's right."

Witness: *Max Drollet* (T. 27):

"Q. Mr. Drollet, do you know the petitioner, Alfons Keil?

A. I do."

T. 28:

"The Court. You met them in your home?

The Witness. In my home.

The Court. Remember about when that was?

The Witness. Oh, it was, I imagine, five and a half years ago.

Q. (By Mr. Hertogs). That would make it late in 1954?

A. '54, that's right, yes. '54—I will say after the half year of '54, close to Christmas of '54, oh, I guess in that fall.

Q. Did the petitioner at that time speak or understand any English?

A. Not very well, no; not too, too well."

T. 29:

"Q. Did he understand enough English to carry on a conversation?

A. Very hardly, I'll say. I would ask the questions, and he would answer them and, of course, his wife would come to the rescue and describe the question, and, of course, the answer also. She was a little more, I imagine, advanced than he was as far as the language barrier. They both spoke with quite a distinct accent, and he did much more so. He would ask a lot of questions by describing certain things, certain material things, as we discussed it or talked about it, we visited.

Q. At that time, when you first met him, was it your impression that he did not fully comprehend the English language?

A. That's right; he did not."

Witness: *Alberta Jane Drollet* (T. 31):

"Q. Mrs. Drollet, are you acquainted with the petitioner, Alfons Keil?

A. Yes.

Q. Would you explain briefly when you first met him?

A. I met him in August, middle part of August, 1954, through his wife, which was employed with me.

Q. At that time, to the best of your recollection, did he speak or understand any English?

T32:

A. No. He was afraid to talk. His wife would try to speak for him, or try to help out.

Q. There has been discussion, prior testimony concerning the wife. How good was her English in August, 1954?

A. Well, not too good. We tried to help her at work, which I think has helped her quite a bit.

Q. Could she carry on a conversation in English?

A. No, we would kind of patch it up altogether to try to get her conversation. No, not so well.

Q. When do you feel that the petitioner first learned sufficient English to carry on a conversation?

A. I would say about a year and a half to two years with us; we would all help her at work and correct her and she finally caught on.

Q. How about Mr. Keil?

A. Well, Mr. Keil is a little bit slower, I think, in his English grammar."

As was stated in the *Moser* case, 341 U.S. 43, 46 an alien must have been given an opportunity to make an intelligent election between exemption and no citizenship or no exemption and citizenship. This alien did not deliberately and consciously, with full knowledge of the consequences, execute Selective Service Form C-294 on or about February 26, 1954. At that time he did not have sufficient understanding of the English language to enable him to comprehend the full import and legal consequences of that document. This is not a case where there was an intelligent election nor misapprehension, since appellant at that time did not have any knowledge concerning the matter to which that form pertained. It was not until more than five years later that appellant and his wife were made to realize, during the course of interrogation by a naturalization Examiner, that the document signed by

plant was in fact an application for exemption
military service. Under such circumstances, the
plant certainly is entitled to be relieved from the
ment of citizenship which would otherwise result.

The Court of Appeals for the District of Columbia
Machado v. McGrath, 193 F.2d 706, 709 (Certiorari
nied, 342 U.S. 948) when considering the question
relief from such debarment, stated:

"The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

strict letter of the statute must yield to avoid cap-
ous interpretations. *Delgadillo v. Carmichael,* 332
S. 388, 391. Where, as here, a penalty is imposed
e statute should be liberally construed to avoid the
position of the penalty. *Fong Haw Tan v. Phelan,*
3 U.S. 6, 9-10.

The finding of the lower Court is equivalent to ban-
hment and exile. By its very terms, it finds to ap-
llant's detriment that there exists a disability not
r today, or tomorrow, but forever—a finding that he
ineligible to citizenship, a finding which makes him
rmanently inadmissible for readmission to the
nited States for lawful permanent residence. The
als are high and his right to remain in this country
it his wife, whose application for citizenship was
rated, should not be permitted to stand on such a
outful premise.

PRAYER

For the reasons set forth above, appellant respectfully requests that the decision of the lower Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
February 2, 1961.

Respectfully submitted,
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